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No. 95-1084

In The

Supreme Court of the United States

October Term, 1995

STATE OF ALASKA,

Petitioner,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,

Respondents,

v.

KATIE JOHN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF ARIZONA, HAWAII, MONTANA, NORTH DAKOTA and SOUTH DAKOTA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Come now the States of Arizona, Hawaii, Montana, North Dakota and South Dakota, through their Attorneys General, and file this brief Amici Curiae, pursuant to Rule 37.2 and .5 of the Supreme Court Rules, in support of the petition of the State of Alaska for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

This case involves the geographic scope of the preference to hunt and fish for subsistence purposes established by Congress in Title VIII of the Alaska National Interest Lands Conservation Act ("ANILCA"), Public Law 96-487. The subsistence preference established by Congress is confined to the federal "public lands" in Alaska. Immediately at issue is the question whether the term "public lands," as defined in ANILCA, includes navigable waters of Alaska in which the United States has an interest by virtue of the reserved waters doctrine. An affirmative answer to that question would permit a potentially massive federal intrusion into an area traditionally regulated by the State of Alaska. The answer given by the court of appeals was affirmative.

Amici States are alarmed by the analytical method employed by the court of appeals to substitute *Chevron*[1] deference for the "clear statement" rule, required by principles of federalism, and also by the court's interpretation of boilerplate language found in hundreds of federal statutes. For the first time, to our knowledge, the

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[1] Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

reserved waters doctrine has been applied by a court to expand the boundaries of federal public land.

Interest of Amici States

The Western States are characterized by vast areas of federally owned public lands, large tracts of which are reserved from the public domain for purposes of Indian reservations, national parks, national recreation areas, national forests, national wildlife refuges, and national wild and scenic rivers. Water is an important tool in the management of these and other lands, especially in the arid Western States.

In the present case, two features of the decision of the court of appeals are of concern to Amici States: (1) its method of preemption analysis, in an area of traditional state authority, which eviscerates the "clear statement" rule; and (2) its unprecedented holding that the reserved waters doctrine can be employed to expand public land boundaries.

In light of the modern disposition of this Court to view the structure itself of the federal government as the principal safeguard against preemption of state sovereignty, so-called process protection, *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 547-554 (1985), it is critical that the "clear statement" rule, an essential adjunct of process protection, be observed and applied and not, as in the approach of the court of appeals, subverted through application of the *Chevron* rule of deference.

Further, in light of the complexity and controversy which characterize the reserved waters doctrine, it is simply unimaginable, in a statute designed to complete the process of allocating Alaska lands, *Amoco Production Co. v. Gambell*, 480 U.S. 531, 549 (1987), that Congress would have employed the reserved waters doctrine as a device for geographical delineation of the public lands when every attempt at the national level to address the "reserved waters" issue has underscored its complexity.

Notwithstanding the footnote assurance of the court of appeals[2] that its precedent has no precedential value to authorize federal "usurpation" in other states because "ANILCA applies only to Alaska" and because the court's interpretation of the public lands definition "is necessary to give meaning to [ANILCA's] purpose of providing an opportunity for a subsistence way of life," the broad implications of the court's holding are not so easily dismissed.

First, the ruling of the court of appeals interprets boilerplate language found in hundreds of statutes collected in Title 16 of the United States Code. The temptation to apply the court's interpretation to identical language in other public land statutes surely will be indulged by litigants seeking public land buffer zones

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[2] "Our interpretation of the term public lands in this case will not allow the United States to usurp state power over navigable waters elsewhere. ANILCA applies only to Alaska and our interpretation of its definition of public lands is necessary to give meaning to its purpose of providing an opportunity for a subsistence way of life." State of Alaska v. Babbitt, Appendix to the Petition of the State of Alaska for Writ of Certiorari 8, n.9. (hereinafter "Pet. App. ___").

and could well prove irresistible to a court, particularly if the results are congenial. Second, ANILCA is not the only federal statute possessing a broad statutory purpose. Broad statutory purpose of the Wilderness Act, for example, was precisely the driving wedge in *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990), an action to compel the Forest Service to assert impliedly reserved water rights in Colorado's twenty-four wilderness areas for adjudication within the state's water allocation system. Indeed, federal statutes expressing broad purposes are today the rule, not the exception. In consequence, Amici States file this brief because of their fundamental interest in avoiding the "usurpation" of state sovereignty, the facilitation of which is inherent in the ruling of the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

1. Federal Preemption In an Area Traditionally Regulated by the States Requires a Clear and Manifest Purpose on the Part of Congress, and the *Chevron* Rule of Deference is Not a Substitute Analysis.

Since statehood in 1959, management of the valuable fishery resources found within the navigable waters of Alaska has been one of the foremost regulatory activities of Alaska state government, and enormous resources of the State have been expended in the conservation of these fisheries. The court of appeals nevertheless determined that Congress, in ANILCA, intended to preempt state fishery management in some navigable waters, although the court was uncertain which navigable waters of Alaska

Congress had preempted. Missing from ANILCA's text or legislative history, according to the court below, was "the clear direction necessary to find that Congress spoke to the precise question of *which* navigable waters are public lands." Pet. App. 8.

Discovering no clear indication from Congress, the court of appeals turned immediately to the second step of the *Chevron* analysis: "Lacking clear direction, we must decide whether the federal agencies' conclusion that public lands include some navigable waters under the reserved water rights doctrine is based on a permissible construction of the statute." Pet. App. 9. Observing that intent to reserve waters is inferred when Congress sets aside parcels for federal purposes, it followed for the court below that the United States has interests in some navigable waters. On that basis, the court of appeals "held to be reasonable" the federal agencies' conclusion that the definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine. Pet. App. 12. The court below held also "that the federal agencies that administer the subsistence priority are responsible for identifying those waters." Ibid. Subsequent to the April 20, 1995 ruling of the court of appeals in this case, the Alaska Supreme Court handed down its decision in *Totemoff v. State* 905 P.2d 954 (Alaska 1995), which conflicts directly with the Ninth Circuit ruling on the geographic scope of "public lands," as defined in ANILCA.

Numerous Supreme Court precedents lay out the path which the court of appeals was obliged to follow in deciding whether "public lands," as defined in ANILCA,

include navigable waters of Alaska. The fisheries in the navigable waters of Alaska traditionally have been managed by the State and, in such circumstances, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This "assumption" provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts. *United States v. Bass*, 404 U.S. 336, 349 (1971). The Supreme Court's reluctance to find preemption where Congress has not spoken directly to an issue is rooted in principles of federalism and respect for state sovereignty. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (concurring opinion of Blackmun, J.).

Indeed, if the reserved powers of the several States include the power to enact laws and to give effect to such laws through executive action, then the assumption that enacted state laws are not to be overridden under the Supremacy Clause unless congressional intent is clear finds structural support in the Tenth Amendment. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law"); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-147 (1963) ("[W]e are not to conclude that Congress legislated the ouster of this [state] statute . . . in the absence of an unambiguous congressional mandate to that effect"); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947) ("Any indulgence in construction should be in favor of the States, because

Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States"). And if, as stated in *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 550-551 (1985), the principal means chosen by the Framers to ensure the role of the States in the federal system is to be found in the structure of the federal government rather than in discrete limitations of federal powers, then the "clear statement" rule takes on added constitutional significance for it is an essential adjunct in the process protection of the States. *But cf. United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 1629-30 (1995).

The court of appeals not only failed to honor its obligation to apply the "clear statement" requirement, it failed even to acknowledge its existence. Instead, the court below determined that Congress did not speak to the precise question of which navigable waters are "public lands," and proceeded immediately to ascertain whether the federal agency position in the litigation is based on a permissible construction of the statute.[3] Not

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[3] The inappropriateness of *Chevron* deference in this case is heightened by the fact that the agency interpretation is a litigating position, not final agency action adopted with the safeguards of public procedure. As described by the court of appeals, "Prior to oral argument before the district court, the federal agencies agreed with the state. But at oral argument, those agencies modified their position, arguing that public lands include those navigable waters in which the federal government has an interest under the reserved water rights doctrine." Pet. App. 6. The Supreme Court has refused to apply *Chevron* deference to agency litigating positions that are unsupported by regulations, rulings or administrative practice. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988).

whether the agency reflected the clear purpose of Congress, but whether the agency reading possesses a rational basis.

These modes of analysis are not interchangeable, and their purposes differ. The "clear statement" rule is rooted in federalism, the *Chevron* rule of deference in separation of powers. The "clear statement" rule safeguards state sovereignty by ensuring that, absent unambiguous evidence of Congress's intent, traditional state police powers are not to be preempted. *Chevron* deference, by contrast, comes into play when congressional intent is ambiguous, permitting a federal agency vested with authority to administer a statute to fill in the statutory gaps and requiring a reviewing court not to trench on the view of a coordinate branch, if it be reasonable, regardless of what the court's view might have been *de novo*.

The two methods of analysis can be harmonized only if courts fulfill their obligation under the first step of *Chevron*: "On a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.' If we can do so, then that interpretation must be given effect. . . . " *National Labor Relations Bd. v. United Food & Commercial Workers*, 484 U.S. 112, 123 (1987). The "clear statement" rule is one of the tools which courts must apply, and being rooted also in the Constitution, its provenance is no less impressive than that of *Chevron* step two. For a finding of intention to preempt, a clear and manifest purpose of Congress is "always required." *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). If analysis of the statute discloses no such intent, then the "clear statement" rule must be

given effect and the preemption inquiry is at an end. This is the method of analysis employed by Circuit Judge Hall, in dissent, viz., to attempt to determine whether clear congressional intent exists to preempt state authority through an examination of statutory text and, if such intent not be found, to decline the temptation to rewrite the statute to achieve congenial results. Pet. App. 15-22, 23-24.

According to this Court, "The subsistence-protection provisions of the statute must be viewed in the context of the Act as a whole." *Amoco Production Co. v. Gambell*, 480 U.S. 531, 549 (1987). By contrast, the ruling of the court of appeals is conspicuous for its reliance on broad statutory purpose and for its failure to pursue a close reading of the text of the "public lands" definition. The court below also failed entirely to relate that definition to other provisions such as the explicit jurisdictional limitation in section 1314(a) and (b), 16 U.S.C. § 3202(a), (b). The latter provisions of ANILCA are devoted expressly to the preemptive scope of the statute, and specifically with respect to fish and wildlife, the very subject matter of this litigation. These provisions expressly fence off from the Secretary any authority over the public lands unless "specifically provided by this Act." By its terms, therefore, section 1314(b) requires that secretarial authority be specifically provided and thereby forecloses any argument for authority in the Secretary emanating from broad statutory purpose, precisely where the court of appeals sought refuge.

The court of appeals expressly declined to yield to statutory text, declaring that if it gave meaning to the term "title" in the definition it would undermine broad

statutory purpose, and this it was unwilling to do. Pet. App. 13. Instead, the court of appeals substituted the second step of *Chevron* for the "clear statement" rule with the result that, while a clear and manifest purpose by Congress to preempt traditional state authority is always required, if missing it can be supplied by the determination of a federal agency which purports to be vested with authority to administer the federal statute,[4] provided only that there be found some rational basis for the agency determination. In the analysis of the Ninth Circuit, therefore, the failure to identify in the statute a necessary basis for preemption triggers deference to a federal agency finding of preemption. That, of course, turns the "clear statement" requirement on its head.

Instead of assuring that the federal-state balance will not be disturbed unnecessarily by the courts, substitution of *Chevron* deference for the "clear statement" requirement eviscerates the latter in a case such as this, tipping the scales decisively against state sovereignty. If, in fact, the rule in *Chevron* may be so manipulated that state

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[4] Concerning the more fundamental issue of whether the Secretary (of the Interior and of Agriculture) has been vested with authority to manage fish and wildlife on the public lands of Alaska to implement the subsistence preference of ANILCA § 804, and thereby preempt traditional state authority on the public lands, the district court also short-circuited the "clear statement" rule and ignored the express directive of ANILCA § 1314(b) by attributing the absence of a clear and manifest purpose to preempt to *congressional inadvertence*: "The court concludes that Congress unintentionally and inadvertently omitted an express provision authorizing the Secretary to implement Section 804 in the absence of a state program." John v. United States, 1994 WL 487830 at *7 (D. Alaska 1994).

sovereignty occupies such a precarious position, and if the federal courts must avoid judicial usurpation of functions entrusted by Congress to a coordinate branch but may, employing *Chevron* deference, allow usurpation of powers traditionally exercised by the States, then this Court should announce the matter so that Congress may know that a long line of Supreme Court precedents does not mean what it says and that the burden in preemption issues has shifted fundamentally. In that way, Congress may be advised that it must leave nothing to chance if process protection is to have any vitality.

2. Public Land Boundaries Are Not Linked to Reserved Water Rights, and the Statutory Language Invoked by the Court of Appeals to Achieve this Remarkable Result is Boilerplate Having No Such Purpose.

If the court of appeals is correct in holding that use of the word "interests" in the ANILCA "public lands" definition, 16 U.S.C. § 3102(1)-(3), calls into play the reserved waters doctrine to determine the geographic boundaries of public lands in Alaska, then the foundation is laid for a massive extension of federal authority in States where federal lands are set aside for specific purposes. This for the reason that the language "land, water and interests therein" is boilerplate repeated *in haec verba* in hundreds of statutes compiled in Title 16 of the United States Code to authorize federal officials to acquire property interests for parks and conservation.[5]

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[5] E.g., 16 U.S.C. §§ 90, 90b(a), 110c(c)(3), 121, 228b(a), 230a(b), 230g(a), 272(a), 273(a), 398d(a), 410j, 410o, 410p(a), 410bb(b)(1), 410ff-1(a), 410gg, 410gg-1(a), 410ii-3(a), 410jj-3(c),

As evident throughout Title 16, the term "interests" in lands or waters is employed to denote something less than a fee simple interest and includes easements, scenic or other, 16 U.S.C. §§ 410ff-1(a), or leasehold interests, 16 U.S.C. §§ 230a(a), 410qq-2(a), or "freehold, leasehold or lesser interest," 16 U.S.C. § 459c-7, or "contracts for options to acquire" lands, waters and interests therein. 16 U.S.C. § 460*l*-10b. Throughout Title 16, the Secretary of the Interior is authorized to acquire "lands, waters and interests therein" by purchase, donation or exchange. E.g., 16 U.S.C. §§ 90b, 398d(a), 410j, 459h-1(a), 460cc-1(a), 460aaa-3(a), 698(c). Because Congress obviously is employing the phrase in its ordinary property sense, it often uses the phrase in a way that is wholly incompatible with any notion that the term "interests" includes federal reserved water rights. E.g., 16 U.S.C. § 230a(a) (lands, waters and interests therein owned by the State of Louisiana); 16 U.S.C. § 410o (authorizing the Secretary of the Interior to transfer to the State of Florida by quitclaim deed the land, water and interests therein previously acquired by the United States for Everglades National Park); 16 U.S.C. § 460*l*-8(a) (authorizing the Secretary to make payments to States for acquisition by the States of lands, waters and interests); 16 U.S.C. § 471i(h)(1)(A) (authorizing the Secretary of the Interior to make grants to the State of New Jersey for acquisition of lands, waters and interests therein in the Pinelands National Reserve).

410mm-2(b), 410qq-2(a), 410rr-2, 410rr-7(c), 459d-3(a), 459e-1(a), 459h-1(a), 459h-3, 459i-1, 459j-1, 460*l*-8(a), 460*l*-9(a)(1), 460*l*-10a, 460*l*-10b, 460m-3, 460m-9(a), 460m-16(a), 460p-2(a), 460q-2(a), 460r-2(a), 460s-7(a), 460z-6(a), 460z-13, 460aa-12, 460bb-3(a), 460cc-1(a), 460ee(c)(1), 460ff-1(b), 460ii, 460ii-1(a), 460kk(c)(1), 460ww(b).

Given the nature of the reserved waters doctrine, it is inconceivable that Congress intended to employ it as a geographic delineator of public land boundaries. The reserved waters doctrine certainly may involve the right to use the waters of a navigable stream yet the water column itself, the corpus of a navigable stream, never becomes, or in the nature of things, can become the subject of fixed appropriation or exclusive dominion. "Neither sovereign nor subject can acquire anything more than a mere usufructuary right therein . . . . " *Sweet v. Syracuse*, 129 NY 316, 335, 27 NE 1081, 1084 (1891), quoted with approval in *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954).

An intention by Congress to reserve previously unappropriated waters to accomplish the purposes for which a reservation of public lands is established is inferred and need not otherwise be demonstrated. *Cappaert v. United States*, 426 U.S. 128, 139 (1976). But congressional intent to employ the reserved waters doctrine as delineator of the geographic scope of federal public lands is something else again. Owing to the nature of the reserved waters doctrine, the idea that it serves the purpose of geographic delineation is so bizarre that a demonstration is required that Congress had it in mind. However, as stated by the district court, there is no reference to the reserved waters doctrine in ANILCA or in its voluminous legislative history.

The reserved waters doctrine is a doctrine of need, and state courts are the fora to define and clarify the scope of reserved federal water rights. Any implied reservation relates only to use of the minimum amount of

water necessary to fulfill the specific purposes of a reservation, not more. *Cappaert v. United States*, 426 U.S. 128, 141 (1976).[6] Congress in the 1952 McCarran Amendment, 43 U.S.C. § 666, waived the sovereign immunity defense of the United States in state river system adjudications to allow federal water rights to be determined along with state rights, thereby achieving an equitable and orderly allocation in time of shortage. This Court has held that federal reserved water rights are also subject to the McCarran Act waiver in such state adjudications. *United States v. District Ct. For Eagle County*, 401 U.S. 520 (1971).

The judicial mechanism to quantify reserved rights to use of water is complex, protracted and costly, a single adjudication characteristically taking years to resolve. The Wyoming state court determination in the Big Horn River Adjudication, which quantified the reserved rights of the Shoshone and Arapahoe Tribes, took eleven years to conclude. *In Re Rights to Use Water in the Big Horn*

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[6] Not only is there no mention of reserved water rights in ANILCA or its voluminous legislative history, there is, in general, no need to quantify reserved water rights in Alaska for an abundance of water exists in that state. Southeastern Alaska and the coastal area south of the Alaska Range, which includes Tanada Creek and the Copper River within the Wrangell-St. Elias reservation, the area of dispute in this litigation, possesses a maritime climate much affected by the Japan current. Annual precipitation is heavy, in the form of rain near sea level and in the form of snow at medium and high elevations. Report on Water Resources of Alaska Prepared for the Senate Select Committee on National Water Resources, Department of the Interior, page 1 (Basic Physical Data), December 1959. With respect to arms of the sea which are appurtenant to much of Southeastern Alaska, the reserved waters doctrine has never been applied to marine waters.

River, 753 P.2d 76 (Wy. 1988), aff'd *Wyoming v. United States*, 492 U.S. 406 (1989).

While the broad legal principle is easily asserted ("Let us hope," said the court of appeals, Pet. App. 13, "that federal agencies will determine promptly which navigable waters are public lands subject to federal subsistence management"), every attempt at the national level to address the reserved waters issue has immediately confronted its uncertainty.[7] Until the scope of the

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[7] The 1970 report to Congress of the Public Land Law Review Commission, established by Public Law 88-606, declared that while the reservation doctrine should not be discarded, "Nevertheless, the implied reservation doctrine as announced and applied in *Arizona v. California* has created many problems. Numerous unanswered questions about its scope and impact remain. The two most important questions which Congress should resolve, however, center on (1) the uncertainty which the doctrine has engendered, and (2) the equity of holders of water rights. . . . " One Third of the Nation's Land, A Report to the President and Congress by the Public Land Law Review Commission, 146 (Washington, D.C., June 1970).

The 1973 report to Congress of the National Water Commission, established by Public Law 90-515, observed that reserved rights "create large uncertainties in the water budgets of Federal and State water resources planners and private investors" and recommended to Congress that federal water uses be quantified in conformity with State law. Water Policies for the Future, Final Report to the President and Congress by the National Water Commission, 465-466 (Washington, D.C., June 1973).

The 1977 report of the Federal Reserved Water Rights Task Group, convened as part of President Carter's Water Resources Policy Review, see 42 Fed. Reg. 37940, 37957 (October 20, 1977), observed that "the absence of identification and quantification of most of the reservations of water has caused considerable

reserved water right is quantified in state adjudication, the extent of the right is unknown. Teams of specialists in hydrology, geomorphology, aquatic and riparian biology, limnology and botany would be necessary to quantify the minimum amount of water necessary to support the numerous and complex dynamics of the specific purpose or purposes for which a particular conservation unit in Alaska was set aside. As stated by the dissenting judge, the task of determining the exact quantity of water necessary to achieve the goal of subsistence fishing "would be an administrative nightmare." Pet. App. 20.

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uncertainty for all parties using water or administering water rights." And later in the report: "The failure to identify and quantify Reserved Rights has raised some serious issues complicating Federal-State regulations." Federal Reserved Water Rights Task Group Report, 5, 6 in Water Resource Policy Study, December 6, 1977.

The 1978 report to Congress of the Comptroller General, Reserved Water Rights for Federal and Indian Reservations: A Growing Controversy in Need of Resolution, CED-78-176 (November 16, 1978), asserted as its principal (cover page) conclusion: "Undetermined Federal and Indian reserved water rights in the Western States are causing great uncertainties about existing water uses" and that "there is an urgent need to settle the problem because the controversy is becoming more acute as new and existing water uses place greater demands on the limited water supply in the United States."

Congress in the 1971 Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629, expressly contemplated that there would be an Alaska lands act, 43 U.S.C. § 1616 (d)(2), and worked almost continuously on the "(d)(2)" legislation from 1972 to ANILCA's enactment in 1980, the period when the reports cited above were being received by Congress.

The court of appeals determined that Congress in ANILCA "spoke to the precise question of whether *some* navigable waters may be public lands." Pet. App. 8 (italics in original). This the court inferred from section 804 of ANILCA which establishes a priority on public lands to take fish and wildlife for subsistence purposes. 16 U.S.C. § 3114. Because subsistence uses include fishing and since, according to the court of appeals, "subsistence fishing has traditionally taken place in navigable waters," the court concluded: "[W]e have no doubt that Congress intended that public lands include at least some navigable waters." Pet. App. 8. This inference forms the fundamental premise of the court's ruling, its enabling condition, but it is a flagrant *non-sequitur*. First, Congress expressly limited the section 804 preference to the "public lands," as defined, not to places where subsistence fishing has traditionally occurred. This Court once before rejected a comparable notion "that Congress was merely waving its hand in the general direction of northwest North America when it defined the scope of ANILCA . . . . " *Amoco Production Co. v. Gambell*, 480 U.S. 531, 548 (1987). Second, subsistence fishing occurs throughout non-navigable waters of Alaska so the statutory priority would by no means be a nullity if it did not extend to navigable waters.

By its very nature the reserved waters doctrine is unsuitable as a geographical delineation device. Moreover, in view of its complexity and uncertainty, well known to Congress, it is inconceivable that Congress would have employed the doctrine to delineate the geographic boundaries of the public lands in Alaska. Such a

conception is wholly artificial and totally devoid of practicality. Nevertheless, its implications for expansion of federal authority are far reaching.

CONCLUSION

For the reasons set forth, the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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